IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 21ST NOVEMBER 2006 / 30TH KARTHIKA 1928

WP(C).No. 26493 of 2006(D)

OS.259/2006 of MUNSIFF COURT, KOTTARAKKARA

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PETITIONER:

CHITHARA GRAMA PANCHAYAT, CHITHARA,
KOLLAM DISTRICT, REPRESENTED BY ITS
PRESIDENT.

BY ADV. SRI.V.N.ACHUTHA KURUP (SR.)
SRI.BINDU SREEKUMAR
SMT.C.AMRITHA

RESPONDENTS:

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1. STATE OF KERALA, REPRESENTED BY THE
CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE ASSISTANT ENGINEER,
P.W.D. ROADS DIVISION, CHADAYAMANGALAM.

3. MANJU, W/O.ANILKUMAR,
VINOD BHAVAN, CHIRAVOOR MURI, KIZHAKKUMBHAGOM,
CHITHARA P.O., MANKODE VILLAGE,
KOTTARAKKARA TALUK.

4. KRISHNA PILLAI, RESIDING AT POURNAMI,
KIZHAKKUMBHAGOM, CHITHARA P.O.,
MANKODE VILLAGE, KOTTARAKARA TALUK.

5. SUKUMARA PILLAI, RESIDING AT BANDHURA
BHAVAN, KIZHAKKUMBHAGOM, CHITHARA P.O.,
MANKODE VILLAGE, KOTTARAKARA TALUK.

6. HAMSA, RESIDING AT VENGAVILA VEEDU,
PERINGODU, CHITHARA P.O., MANKODE VILLAGE,
KOTTARAKARA TALUK.

BY ADV. SRI.B.MOHANLAL FOR R2

BY ADV. SRI.K.HARILAL FOR R5

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 21/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

Petitioner's Exhibits:-

Ext.P1:- True copy of notice No.A3-206/06 dt. 26-6-06 issued by the Panchayat.

Ext.P2:- True copy of the letter dt. 19-9-06 issued by Asst.Engineer, PWD Roads Section Chadayamangalam to the S.I of Police, Kadakkal.

Ext.P3:- True copy of the plaint in O.S.259/06 dt. 19-7-2006 of the Munsiff Court, Kottarakara.

Ext.P4:- True copy of I.A.No.2944/06 18-7-06 in O.S.259/06.

Ext.P5:- True copy of official memorandum dated 6-10-06 issued by the Munsiff Kottarakkara to 2nd respondent.

Ext.P6:- True copy of resolution dated 22-7-06 of the Panchayat.

Ext.P7:- True copy of letter dated 10-7-06 from Medical Officer, P.H.C Centre, Madathara to the President/Secretary of Chithara Grama Panchayat.

Respodnents' Exhibits:-

Ext.R3(a)- The true copy of the injunction order in I.A.No.1716/06 in O.S. No.259/06.

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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W.P.(C) NO.26493 OF 2006

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Dated this the 21st day of November,2006

JUDGMENT

Can the court issue a official memorandum to a witness who is a not a party to the suit to restore the property to its original position, when he is an official witness and is not an agent of the defendants or party of the order of temporary injunction. This is the question to be decided in this petition.

2. Petitioner Chithara Grama Panchayat was requested by Medical Officer, Primary Health Centre, Madathara to take precautions to avoid stagnation of water on the ground that there is a possibility of spreading dengue fever. Panchayat therefore issued Ext.P1 order to the mother-in-law of third respondent. Under Ext.P1, she was informed that the construction of the compound wall is causing obstruction to the drainage and if it is not removed, proceedings will be initiated under

the Kerala Panchyat Raj Act. The notice was not served on the mother-in-law. According to Panchayat, notice was issued under the impression that the property belongs to the mother-in-law of the third respondent. Meanwhile the third respondent filed O.S.259/06 before Munsiff's Court, Kottarakkara seeking a decree for injunction. She also obtained an ex parte order of temporary injunction. Third respondent, on the allegation that defendants violated the order of injunction, filed an application under Order XXXIX Rule 2 for taking action for the alleged violation of the order of injunction. In the course of the enquiry of that application, learned Munsiff examined the witnesses. For the defendants second respondent, Assistant Engineer was examined as DW5. At the time ofhis examination, second respondent admitted that the construction work was done under his supervision. The court asked the witness whether he could restore the structure and he answered in the affirmative. Learned Munsiff

issued Ext.P5 official memorandum, holding that the construction work was done through the plaint schedule property in violation of the order of injunction. The relevant portion of Ext.P5 order reads:

> "It is to be noted that the above construction work done through the plaint schedule property is in violation of the order of injunction passed in I.A.1716/2006. You would also admit that the original position of the plaint schedule property can be restored within seven days. So you are hereby directed to restore the original position of the plaint schedule property by removing all the constructions made in it within seven days and file a compliance report."

This official memorandum is challenged by the Panchayat in this petition filed under Article 227 of Constitution of India.

3. Learned counsel appearing for the third respondent argued that Panchayat has no locus standi or authority to challenge Ext.P5 order and if at all only second respondent could challenge that order and therefore the petition is not maintainable. The second respondent did not appear in the petition. The other respondents have filed separate objections to this petition.

4. Learned Senior counsel appearing for the petitioner and learned counsel appearing for third respondent and the other respondents were heard.

5. As rightly pointed out by the Senior counsel, Ext.P5 order is patently illegal. The Assistant Engineer who was examined as DW5 before court below was not a party to the suit or the injunction application. Hence the order of injunction is not binding on him. He is an official witness and even according to that

witness, he has carried out the construction work in his official capacity as the Assistant Engineer of P.W.D. Roads Division. He has no case that he was an agent or henchman of the defendants. Ext.P2 letter sent by the said witness to the Sub Inspector of Police seeking protection, at the time carrying out the construction, reveals that he acted as directed by the Executive Engineer, PWD Road Division. Even the Panchayat was not made a party in the suit. No order of injunction was sought against the Panchayat also. There is no finding in Ext.P5 official memorandum that second respondent was the agent of the respondents in I.A.1716/06 whereunder the order of temporary injunction was granted. I.A.2944/06 was filed by the third respondent plaintiff to take action for violation of the order of injunction. Learned Munsiff is entitled to pass an order for restoration, if it is found that the construction was made by the respondents in the injunction application or at their instance. But the Munsiff

cannot issue a direction to a witness independently to restore the property to its original position by issuing an official memorandum. If the Munsiff has passed an order on the basis of his evidence tendered as DW5, his evidence was that it was constructed as instructed by the Executive Engineer of P.W.D., his superior officer who in turn was requested to act by the petitioner Panchayat and not by the defendants. Hence an order could not be passed against second respondent on the basis that he violated the order of injunction.

6. It is clear that court below should not have issued Ext.P5 official memorandum to the witness who was examined in that case when he has nothing to do with the defendants or the suit or the order of temporary injunction. Even though petitioner Panchayat is not a party to Ext.P5 official memorandum or the suit, it is clear from the facts that the order of temporary injunction itself was obtained, when the Panchayat had taken action to remove the compound wall. The official

memorandum which is found to be illegal and issued without authority was to undo the action done at the instance of the Panchayat. In such circumstance, petitioner is entitled to approach this court under Article 227 of constitution of India. Ext.P5 official memorandum was issued without authority. It is patently illegal. Hence it is quashed. It is made clear that quashing of Ext.P5 order will not fetter the trial court to pass appropriate order in I.A.2944/06 filed under Order XXXIX Rule 2 of CPC in accordance with law. It is also made clear that the trial court cannot pass an order in that application also against a person who is not a party to the suit or the order of injunction.

Writ Petition is disposed as above.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006